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Supreme Court, U.S.
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CLERK

86-1691
NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

OCTOBER TERM, 1986

TONY RAYBURN,

PETITIONER

vs.

UNITED STATES OF AMERICA,

RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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A. QUESTIONS PRESENTED FOR REVIEW

(1) Whether the recordings of telephone conversations made by certain defendants in the case before this Court were inadmissible because the Federal Wiretap Act, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510, et seq (1982), bans the use of the fruits of interceptions made for the purpose of committing a criminal act?

(2) Whether the Court of Appeals for the Sixth Circuit erred in construing the Act -- the Court of Appeals did not strictly construe the Act according to its plain meaning, but, rather, construed the statute as if it were a civil statute?

(3) Whether the decision of the Court of Appeals for the Sixth Circuit conflicts with the decision rendered by the Court of Appeals for the Eighth Circuit on the same matter in United States vs. Phillips, 540

F.2d 319 (8th Cir.), rehearing denied, (8th Cir.), cert. denied, 429 U.S. 1000 (1976) and with the decision of the Sixth Circuit in United States vs. Jones, 542 F.2d 661 (6th Cir. 1976).

B. PARTIES TO THE PROCEEDINGS

W. Hickman Ewing and Frederick H. Godwin, Un' ed States Attorney and Assistant United States Attorney, represented the United States of America before the District Court for the Western District of Tennessee, Western Division. Mr. Ewing and Mr. Godwin also represented the Government before the Court of Appeals for the Sixth Circuit.

At the District Court level, James D. Causey served as defense counsel for Defendant, Tony Rayburn. Mr. Causey represented Mr. Rayburn through the appeal to the Court of Appeals for the Sixth Circuit.

At the District Court level and on appeal, Robert M. Friedman represented Defendant, Walter Person.

At the District Court level and on appeal, Stephen Butler and Albert Boyd represented Defendant, Howard "Ace" Underhill.

At the District Court level and on appeal, Frank Holloman represented Defendant, Pat Tata.

At the District Court level and on appeal, Tommy Jagendorf represented Defendants, Eddie Osborne and Joe Osborne.

John P. Colton, Jr. represented Defendant, Daniel Rokitka.

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D. REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the Court of Appeals for the Sixth Circuit has been recommended for full text publication. A copy of the unpublished Opinion is included in the Appendix, separately presented.

E. JURISDICTIONAL STATEMENT

(1) The judgment sought to be reviewed was decided and filed March 6, 1987.

(2) The Defendant did not file a Petition for Rehearing En Banc nor has Defendant petitioned for an extension of time within which to file his Petition for Certiorari.

(3) The Petitioner anticipates no cross-petition for certiorari; however, the Petitioner anticipates that one or more of the Defendants in the consolidated appeal will petition for certiorari.

(4) The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

F. RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

(1) Rule 901 of the Federal Rules of Evidence

(2) Rule 1002 of the Federal Rules of Evidence

(3) 18 U.S.C. §2

(4) 18 U.S.C. §371

(5) 18 U.S.C. §1084(a)

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(13) 26 U.S.C. §7262

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(Sections 39-6-601 and 39-6-602 are set forth in Appendix F and Appendix G)

G. STATEMENT OF THE CASE

On November 20, 1985, the Federal Grand Jury for the Western District of Tennessee returned sixteen (16) indictments charging thirty-five (35) individuals with violations of federal gambling and narcotics laws. Among those indictments was a five-count indictment which charged Howard "Ace" Underhill, Daniel J. Rokitka, Eddie Osborne, Joe Osborne and Walter Person with violations of federal gambling laws.

Count I charged Underhill, Rokitka, the Osbornes and Person with conducting an illegal gambling business in violation of Title 18 U.S.C. §1955.

Count II charged Underhill, Rokitka, the Osbornes and Person with a conspiracy to violate federal gambling laws in violation of Title 18 U.S.C. §371.

Count III charged Eddie Osborne with traveling in interstate commerce with the intent to distribute the proceeds of unlawful

activity in violation of Title 18 U.S.C. §1952(a)(1).

Count IV charged Underhill, Rokitka and Eddie Osborne with the use of wire communication facilities in interstate commerce to transmit gambling information in violation of Title 18 U.S.C. §1084(a).

Count V charged Underhill, Rokitka and the Osbornes with accepting wagers without having paid the Federal Wagering Tax in violation of Title 26 U.S.C. §7262 and Title 18 U.S.C. §2.

Also among the November 20, 1985 indictments was a three-count indictment charging Leck Fraley, Jr., Pat Tata, Michael Ezell, Tony Rayburn and Donald E. "Tapper" Swanton with violation of federal gambling laws. All five defendants were charged in Count I with conducting an illegal gambling business in violation of Title 18 U.S.C. §1955 and 2.

Count II charged the Defendants with conspiracy to violate federal gambling laws in violation of Title 18 U.S.C. §371.

Count III charged the Defendants with accepting wagers without having paid the Federal Wagering Tax in violation of Title 26 U.S.C. §7262.

On February 7, 1986, District Judge Robert M. McRae, Jr. denied certain motions to suppress evidence filed by Defendants Underhill, Rokitka, Eddie Osborne and Joe Osborne. Those motions concerned the execution of search warrants at an apartment leased to the Defendant Rokitka, on the persons of Rokitka and Underhill, and searches of vehicles of Rokitka and Underhill on the premises.

On February 7, 1986, Defendant, Walter Person, filed a written Motion in Limine Regarding the Suppression of Evidence to-wit: Tape Recorded Communications and/or Motion to Prohibit the Use of Intercepted Tape Recorded Oral Communications Pursuant to 18 U.S.C. §2515. The attorneys for Underhill and Rokitka orally joined in this motion and were later joined by the Osbornes on March 7, 1986.

Defendant, Tony Rayburn, filed a Motion seeking to suppress the same tape recordings on February 26, 1986.

Defendant, Pat Tata, joined in this Motion on March 5, 1986.

On February 28, 1986, District Judge McRae held a single evidentiary hearing regarding these tapes. On March 6, 1986, Judge McRae ordered the tapes suppressed. The United States filed its Motion to Reconsider on March 31, 1986. On April 4, 1986, the United States filed a Notice of Appeal. Judge McRae denied the Motion to Reconsider on April 8, 1986.

The United States perfected its appeal to the Court of Appeals for the Sixth Circuit.

In its Opinion dated March 6, 1987, the Court of Appeals for the Sixth Circuit reversed the judgment of the District Court.

The relevant facts underlying the indictments handed down by the Federal Grand Jury for the Western District of Tennessee are as follows:

On March 23, 1985, a federal search warrant was served at an apartment registered to Defendant, Dan Rokitka. Rokitka and Howard "Ace" Underhill were present at the time of the search. Agents seized linesheets, gambling paraphernalia, and records. Also seized were cassette tapes found in and near tape recorders hooked to the telephone in the apartment. While agents were executing the search warrants, the phones in the apartment continued to ring. Agents answering the phones found the calls were for the purpose of placing bets. Agents who executed the search turned the seized evidence over to Special Agent Richard Gray of the Federal Bureau of Investigation.

Gray reviewed the evidence. Gray testified at the suppression hearing.

In Gray's opinion, a bookmaking operation was being carried out at Rokitka's apartment.

Special Agent Gray listened to fifteen (15) tapes seized at Rokitka's apartment. The

subject matter of the tapes was the exchange of gambling information. Gray determined, from listening to the tapes, that the phones were manned by Dan Rokitka and Howard "Ace" Underhill. In one of the recorded conversations between Underhill and Jane Egan, the parties to the conversation discussed problems with certain bettors who, upon losing a bet, would claim they had bet less than they had. [1]

Underhill told Egan that he started recording all of his bets. Special Agent Gray testified that he interviewed Dan Rokitka in the presence of his attorney and Rokitka stated that the purpose of the recordings was to record bets. Gray recalled an incident recorded on

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[1] Jane Egan is a defendant in United States vs. Bill Harlow and Jane Egan, 85-2023-G in the Western District of Tennessee. That indictment also charged violations of federal gambling laws. Ms. Egan filed a Motion to Suppress the same tapes before District Judge Julia S. Gibbons. Her motion as well as the motion of the co-defendant, Bill Harlow, was based on the same theory as the Defendants in the case before this Court argued. Judge Gibbons denied Ms. Egan's motion.

one tape where a caller had a disagreement about a wager. Rokitka played the tape of the bet back. Playing back the tape apparently ended the disagreement.

The tapes in question contained conversations between Underhill and Rokitka and Defendants, Walter Person, Eddie Osborne, Joe Osborne, Pat Tata and Tony Rayburn. The conversations involved the exchange of gambling information and the placing of wagers. All tapes contained either Rokitka or Underhill as a party to the conversation.

H. ARGUMENT

According to Rule 17 of the Rules of the United States Supreme Court, the following list indicates the character of reasons that will be considered in granting a review on certiorari:

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Petitioner, Tony Rayburn, respectfully insists that the case before this Court satisfies the requirements of subsections (a) and

(c) of Rule 17.

In its decision dated March 6, 1987, the Court of Appeals for the Sixth Circuit addressed the question of "whether the participants in an illegal gambling business, some of whom caused their recorded telephone conversations to be intercepted and recorded, are entitled to have these recordings suppressed during a prosecution for violation of federal anti-gambling statutes."

The answer hinged the Court's construction of various provisions of the Federal Wiretap Act, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510, et seq. (1982) (hereinafter referred to as "Title III" or the "Act").

The Court of Appeals quoted the exclusionary provision of the Act contained at 18 U.S.C. §2515:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any

> court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

The Court of Appeals determined that §2515 is not self executing. An aggrieved person may move to suppress the contents of an intercepted communication pursuant to 18 U.S.C. §2518(10)(a) (i). Section 2510(11) defines an aggrieved person as one "who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

As the Court noted, §2511(1)(a) prohibits all willful interceptions of wire and oral communications unless a specific section of the statutes excepts a particular interception. Section 2511(1)(c) prohibits willful disclosure of the contents of communications by a person who knows or has reason to know that information was obtained through an unlawful interception.

Section 2511(2) lists the exceptions to the general proscription against interceptions.

The Defendants contended before the Sixth Circuit that the only exception which could render the tapes legal did not apply because of the purpose for which Defendants Rokitka and Underhill made the tapes. Specifically, the Defendants referred to 18 U.S.C. §2511(2)(d):

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

The District Court found the language of this statute clear and unambiguous and, therefore, felt compelled to comply with its command. The Court of Appeals, however, reached beyond the plain language of this statute to achieve a different result.

The Court of Appeals acknowledged that

the precise question presented in this case has not been decided by the Supreme Court of the United States or another Court of Appeals. The provisions of the Act under review, however, have been considered in other settings.

In deciding the case, the Court of Appeals for the Sixth Circuit employed the following analysis. According to the Court of Appeals, the primary purpose of the Omnibus Crime Control Act is to provide a more effective means for combating organized crime in the United States. The second purpose of the Act is to prohibit all other interceptions and disclosures of wire and oral communications unless specifically authorized by provisions of the Act. (Op. at 8-9). The Court determined that since the interceptions in question were made by private individuals not acting under any color of law, Section 2511(2)(d) is the only exception arguably applicable.

The Court of Appeals concluded that the legality of an interception is determined by the purpose for which the interception is made, not

by the subject of the communication intercepted. Citing United States v. Truglio, 731 F.2d 1123, 1131 (4th Cir.), cert. denied, 105 S.Ct. 197 (1984). The Court observed that generally when the purpose of an interception is to make an accurate record of a conversation with the intention of preventing future distortions by a participant, the interception is legal. Citing, By-Prod Corp. v. Armen-Berry Co., 668 F.2d 956, 959 (7th Cir. 1982); United States v. Phillips, 564 F.2d 32, 33 (8th Cir. 1977).

According to the Court of Appeals' Opinion at pages 9 and 10, Underhill and Rokitka testified that the purpose of taping the conversations was to make a record to settle any future disputes about the terms of betting transactions. The Court's statement is not accurate. Underhill and Rokitka did not testify at the suppression hearing. Rather, Agent Gray testified about his conversations with Underhill and Rokitka.

The Court further addressed the issue of whether the interceptions were made "for the

purpose of committing any criminal . . . act" under the laws of the State of Tennessee. The Court of Appeals stated that the recording was not an element of the criminal transaction of making and accepting bets. The transactions were unlawful in and of themselves. The recordings added nothing. The Court noted, however, that the taping of the conversations did make a gambling record as defined in Tennessee Code Annotated §39-6-601(7) and T.C.A. §39-6-602(e). T.C.A. §39-6-602(e) makes it a misdemeanor to knowingly make, possess or store a gambling record. The Court of Appeals concluded that the communications were intercepted for the purpose of committing a criminal act.

The Court did not end its inquiry, however. The Court further addressed the issue of whether the exclusionary rule contained in §2515 applied to the circumstances of this case.

In its analysis of this issue, the Court of Appeals addressed the appropriate standard to be used in construing statutes.

The Court recognized the general rule

that when the intent of Congress is expressed in plain term the Court must treat that language as conclusive. Citing, Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982). The Court of Appeals strayed, however, from the general rule, relying upon the case of United States v. American Trucking Associations, Inc., 310 U.S. 534, 542-44 (1940).

The Court of Appeals acknowledged that the Supreme Court in Gelbard v. United States, 408 U.S. 41, 48 (1972), described the protection of privacy as the overriding congressional concern behind enactment of Title III. The Sixth Circuit stated that the Act provided protection to the victims of unlawful interceptions, not to the perpetrator. The Court of Appeals concluded:

> We think it is clear that Congress did not intend for §2515 to shield the very people who committed the wrongful interceptions from the consequences of their wrongdoing. Underhill and Rokitka waived their right of privacy in these communications by their deliberate act of causing them to be recorded. If the language of §§2511(2)(d) and 2515 were applied literally to Underhill and Rokitka it would produce an absurd result that we are confident Congress did not intend.

The Court of Appeals rejected Defendant Person's argument that he did not consent to the interception of his conversations and, therefore, was entitled to suppress the tapes containing his conversations. According to the Court of Appeals, if Person had been a mere customer of a gambling establishment, this argument would have merit. Since Person was a confederate of Underhill and Rokitka, the Court ruled that he waived his right of privacy in the conversations. Because all of the Appellees were charged with conspiracy, the Court held the individual defendants bound by the acts of the co-conspirators. Citing, Pinkerton v. United States, 328 U.S. 640, 646-48 (1946); United States v. Bowers, 739 F.2d 1050, 1052 (6th Cir.), cert. denied sub nom., Oakes v. United States, 469 U.S. 861 (1984).

For the following reasons, Defendant, Tony Rayburn, respectfully insists that the Court of Appeals was in error in reversing the judgment of the District Court.

(1) Recordings of telephone conversations made by certain Defendants were inadmissible

because the Federal Wiretap Act bans the use of the fruits of interceptions made for the purpose of committing a criminal act.

Defendant, Tony Rayburn, insists that the tapes seized by the Government in the case before this Court do not meet the requirements of Rule 901 and Rule 1002 of the Federal Rules of Evidence. Moreover, Defendant Rayburn insists that the information contained therein was obtained in violation of 18 U.S.C. §2510, et seq.

In 1968, Congress passed the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §2510, et seq. Sections 2511(2)(d), 2515 and 2518(10)(a) apply to the case before this Court.

18 U.S.C. §2511(2)(d) provides as follows:

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the

Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

18 U.S.C. §2515 provides as follows:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. §2518(10)(a) provides as follows:

> Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the ground that -
>
> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted

> is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.
>
> Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may, in his discretion, make available to the aggrieved person or his counsel for inspection such portions of the interception communication or evidence derived therefrom as the judge determines to be in the interest of justice.

The indictments in the cases before this Court charged the Defendants with violating and conspiring to violate 18 U.S.C. §1955 by conducting illegal gambling businesses in violation of T.C.A. §§39-6-601, 39-6-602, 39-6-603, 39-6-604, 39-6-607, 39-6-608, 39-6-610, and 39-6-611.

Section 1955 provides, in pertinent part, as follows:

Prohibition of Illegal Gambling Businesses. (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section --

(1) "Illegal gambling business" means a gambling business which - (i) is a violation of the law of this State, or a political subdivision in which it is conducted; (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and (iii) has been or remains in substantial continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "Gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenues

in excess of $2,000 in any single day shall be deemed to have been established.

T.C.A. 39-6-602(e) and 39-6-603(a) provide as follows:

> (e) Whoever knowingly prints, makes, possesses, stores, or transports any gambling record, or buys, sells, offers or solicits any interest therein, whether through an agent or employee, or otherwise, shall be guilty of a misdemeanor and shall be fined not more than five hundred dollars ($500.00) and, in the discretion of the Court, imprisoned in the county jail or workhouse for a period of time not more than six (6) months, and in the enforcement of this subsection, direct possession of any gambling records shall be presumed to be knowing possession thereof.
>
> . . .
>
> (a) Whoever knowingly transmits or receives gambling information by telephone, telegraph, radio, semaphore, or similar means, or knowingly installs or maintains equipment for the transmission or receipt of gambling information, shall be fined not more than one thousand dollars ($1,000), or imprisoned not more than one (1) year, or both.

Judge McRae found that Rokitka and Under-Hill made the tapes for the purpose of recording bets; therefore, these Defendants made the

tapes for the purpose of committing a criminal act under the laws of the State of Tennessee regarding gambling, gambling records, and transmitting gambling information. Judge McRae ordered the tapes suppressed under §2515. Defendant Rayburn respectfully insists that Judge McRae correctly interpreted and applied §§2511(2)(d) and 2515 according to the plain meaning of the statutory language.

(2) Criminal statutes should be strictly construed; however, the Court of Appeals did not strictly construe the Federal Wiretap Act in its decision dated March 6, 1987, but, rather, construed the statute as if it were a civil statute, despite its plain meaning.

The Court of Appeals acknowledged the general rule that the plain language of a statute ordinarily defines the purpose of the legislation. Citing, Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982). The Court of Appeals argued that a plain reading of §§2511(2)(d) and 2515 led to an absurd result. The Court cited United States v. American

Trucking Associations, Inc., 310 U.S. 534 (1940) in support of this proposition.

In the American Trucking case, the Supreme Court considered whether the Interstate Commerce Commission's power under the Motor Carrier Act of 1935 to establish reasonable requirements with respect to the qualifications of maximum hours of service of employees of motor carriers extended to employees other than those whose duties affected safety of operation. Id. at 538. The Court restricted the meaning of employees to those employees whose activities affected the safety of operation. Id. at 553.

In the Griffin case, in contrast, the Court literally applied the statute in question. The Griffin case concerned the application of 46 U.S.C. §596, repealed Aug. 8, 1983, which required vessel owners and masters to promptly pay seamen after their discharge from service. Section 596 further authorized seamen to recover double wages for each day payment was delayed without sufficient cause. The Supreme

Court addressed the issue of whether district courts may, in their discretion, limit the period during which wage penalty accrues or whether imposition of the penalty for each day of delay is mandatory. Id. at 565-566. The Court held that the plain meaning of §596 left no room for discretion in deciding whether to exact payment or in choosing the time period for calculating payment. Id. at 570. The Court stated:

> "Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, 'that language must ordinarily be regarded as conclusive.'" Consumer Product Safety Comm'n v. G.T.E. Sylvania, Inc., 447 U.S. 102, 108 (1980).

Id. at 570.

In the Griffin case, Oceanic Contractors, Inc. argued that a literal interpretation of §596 would produce an absurd result. The Court recognized that interpretations which would produce absurd results are to be avoided if alternative interpretations are consistent with the legislative purpose. Id. at 575

(citing, United States v. American Trucking Associations, Inc., 310 U.S. 542-543; Haggar v. Helvering, 308 U.S. 389, 394 (1940)). The Court refused to nullify §596 however hard or unexpected its effects:

> Laws enacted with good intention, when put to the test, frequently, and to the surprise of the lawmaker himself, turn out to be mischievious, absurd or otherwise objectionable. But in such case the remedy lies with the lawmaking authority, and not with the courts. Crooks vs. Harrelson, 282 U.S. 55, 60 (1930).

Id. at 575.

The statutue in the case before this Court is clear on its face. Section 2511(1) prohibits interception or disclosure of wire or oral communications under specific circumstances, "[e]xcept as otherwise specifically provided under this chapter."

Section 2511(2)(d) provides that it is not unlawful for a private person to intercept a wire or oral communication where the person is a party to the communication or where one of the parties to the communication has given prior

consent to the interception "unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution of the United States or of any State or for the purpose of committing any other injurious act."

Under Tennessee law, it is a crime to knowingly print, make, possess, store or transport any gambling record. T.C.A. 39-6-602(3). Under Tennessee law, it is a crime to knowingly transmit or receive gambling information by telephone, telegraph, radio, semaphore, or similar means. T.C.A. §39-6-603(a). Under §2511(2)(d), the interception in the case before this Court was unlawful under the plain meaning of the statute. Section 2515, consequently, prohibits the use in evidence of an interception or its contents if the disclosure of that information violates Title III of the Omnibus Crime Control and Safe Street Acts. Again, the statutory language is plain and unambiguous.

In its decision to reverse the district

court, the Court of Appeals relied upon Gelbard v. United States, 408 U.S. 41 (1972). In Gelbard, the Court addressed the question of whether grand jury witnesses are entitled to invoke §2515's prohibition as a defense to contempt charges brought against them for refusing to testify. The Court concluded that they are entitled to do so. Id. at 43. The Court stated:

. . .

> Except as expressly authorized in Title III, however, all interceptions of wire and oral communications are flatly prohibited. Unauthorized interceptions and the disclosure or use of information obtained through unauthorized interceptions are crimes, 18 U.S.C. §2511(1), and the victim of such interception, disclosure or use, is entitled to recover civil damages. 18 U.S.C. §2520. Title III also bars the use as evidence before official bodies of the contents and fruits of illegal interceptions, 18 U.S.C. §2515, and provides procedures for moving to suppress such evidence in various proceedings. 18 U.S.C. §2518(9) through (10).

In Gelbard, the Court referred to the unequivocal language of §2515 which expressed the "fundamental policy" adopted by Congress

concerning wiretapping and electronic surveillance. Id. at 47. The Court recognized the protection of privacy as the overriding concern of Congress in enacting Title III. Id. at 48. According to the Court:

> Section 2515 is thus central to the legislative scheme. Its importance as a protection for the "victim of an unlawful invasion of privacy" could not be more clear. The purposes of §2515 and Title III as a whole would be subverted were the plain command of §2515 ignored when the victim of illegal interception is called as a witness before a grand jury and asked questions based upon that interception. Moreover, §2515 serves not only to protect the privacy of communications, but also to insure that the courts do not become partners to illegal conduct; the evidentiary prohibition was enacted also to protect the integrity of courts in administrative proceedings.

Id. at 51 (footnotes omitted).

Thus, although the Court of Appeals' Opinion in the case before this Court relies upon the Gelbard decision, it conflicts with that decision.

(3) The decision of the Court of Appeals for the Sixth Circuit entered March 6,1987 conflicts as well with the decision of the Court of Appeals for the Eighth Circuit on the same mat-

ter in United States v. Phillips, 540 F.2d 319 (8th Cir.), rehearing denied, (8th Cir.), cert. denied 429 U.S. 1000 (1976) and with the decision of the Sixth Circuit in United States v. Jones, 542 F.2d 661 (6th Cir. 1976).

In the Phillips case, the Eighth Circuit interpreted the section of the Omnibus Crime Control and Safe Streets Act pertinent to the case before this Court. In the Phillips case, the Defendant appealed his conviction of perjury. The Eighth Circuit vacated the conviction and remanded the case for further proceedings.

The Defendant Phillips was prosecuted for knowingly making false material statements before a grand jury. The grand jury convened in 1971 to investigate a conspiracy involving persons allegedly engaged in organized crime in Kansas City, Missouri and in Northeastern Oklahoma. The alleged objective of the conspiracy was to establish prostitution activities and illegal gambling in Oklahoma nightclubs by offering bribes to local government officials in return

for protection from law enforcement.

A principal target of the grand jury probe was Frank Grayson, an Oklahoma District Attorney. Grayson allegedly provided protection for gambling at certain local clubs. Defendant Phillips, at the time, was a practicing attorney, an Oklahoma State Senator, a close friend and political supporter of Mr. Grayson. According to Grayson's testimony before the grand jury, certain persons told him that Phillips had stated that he controlled Grayson. Specifically, Grayson testified that Charles Davis, the owner of the Shangri La lounge, stated that Phillips could arrange anything Davis needed in the way of protection.

Phillips was called before the grand jury. The Defendant repeatedly denied that he had ever stated to anyone that he could arrange protection. In addition, Defendant Phillips denied that he made any representation to persons affiliated with the Shangri La.

At his trial on the charge of perjury, the

critical evidence was a tape recorded meeting between Phillips, Davis and George Overton, the manager of the Shangri La. A private detective recorded the conversation. The detective did not act under color of the law but, rather, Davis and Overton arranged for the recording. Phillips was not aware that the conversation was being recorded. The purpose of the meeting was to settle a fee arrangement between Phillips and the Shangri La; however, the purpose of recording the conversation was unknown. During the course of the conversation, the Defendant told Davis and Overton that the Shangri La could run illegal liquor and gambling operations on a limited basis. During the conversation, Phillips stated, "I can, I can control Frank[,]" in reference to District Attorney Grayson.

At the trial on the perjury charge, the Government's theory was that the Defendant's statement to the effect that he could "control Frank" was a representation that he could induce Mr. Grayson to produce protection for Shangri

La's illegal activities.

Prior to trial, the Defendant filed a motion to suppress the tape recording on the grounds that it was recorded in violation of the Omnibus Crime Control and Safe Streets Act of 1968. In addition, he also moved to suppress the tape on the grounds that he was not admonished of his Miranda rights before testifying before the grand jury. The trial court denied the motion and admitted the tape and its contents.

On appeal, Defendant Phillips alleged that the conversation in question was recorded for the purpose of committing a tortious act in violation of §2511(2)(d).

At trial, no evidence was presented as to why Davis and Overton recorded the conversation. The Eighth Circuit held that the ultimate burden rests with the Defendant to show that the tape was "unlawfully" recorded. The Eighth Circuit determined that the Defendant in the Phillips case was denied a meaningful opportunity to meet the burden. The Eighth Circuit vacated the

judgment of conviction and remanded the case for hearing to afford the State and the Defendant an opportunity to present evidence as to the purpose of the recording. According to the Court, the effect of §2511(2)(d) is to prohibit any interception, use, or disclosure of a communication by a person not acting under color of law when the purpose is to commit a criminal, tortious or injurious act.

According to the Court, this determination must be made on a case by case basis. Id. at 325 (citing, Meredith v. Gavin, 446 F.2d 794, 798 (8th Cir. 1971).

The Eighth Circuit further reviewed the sections of the Act providing for sanctions for its violation. Under §2515, any oral communication intercepted in violation of the Act should not be received into evidence in a judicial proceeding. Section 2518(10)(a) provides that an aggrieved person may file a motion to suppress the contents of an unlawfully intercepted communication.

The Eighth Circuit further stated:

> Logic requires that the party against whom the evidence is offered, the defendant here, carry the ultimate burden of alleging and proving the specific criminal, tortious, or other injurious purpose for which the interception was made. Id. at 326.

The Eighth Circuit noted, however, that the party seeking to suppress such matter must be given an opportunity to meet his or her burden of proof. The Court stated:

> On remand, the trial judge should require the Government to call the parties responsible for the interception and establish a legal purpose for the interception. If this obligation is met, the Defendant must prove, by a preponderance of the evidence, the existence of one of the exceptions listed in §2511(2)(d). The risk of nonpersuasion shall remain with the defendant. Id.

The Eighth Circuit remanded the case to district court for a hearing to determine the purpose for which the conversation was recorded. If Davis and Overton made the recording for a legitimate purpose, the Eighth Circuit stated that the judgment of conviction must be reinstated. If, however, the defendant proved by a preponderance of the evidence that Davis and

Overton made the recording for a criminal, tortious or other injurious purpose, the tape had to be suppressed. In the event of a suppression, a new trial would be necessary.

The analysis in the Phillips case is consistent with the District Court's ruling in the case before this Court. The District Court's ruling is consistent with the legislative history of the Act. A statement by Senator Hart concerning the Act follows:

> In the substitute that is now pending, we propose to prohibit a one-party consent tap, except for law enforcement officials, and for private persons who act in a defensive fashion. In other words, whenever a private person acts in such situations with an unlawful motive, he will violate the criminal provisions of Title III and will also be subject to a civil suit. Such one-party consent is also prohibited when a party acts in any way with an intent to injure the other party to the conversation in any other way. For example, the secret consensual recording may be made for the purpose of blackmailing the other party, threatening him, or publicly embarrassing him. The provision would not, however, prohibit such activity when the party records information of criminal activity by the other party with the purpose of taking such information to the police as evidence. Nor does it prohibit such recording in other

> situations when the party acts out of a legitimate desire to protect himself and his own conversations from later distortion or other unlawful or injurious acts by the other party.

114 Cong. Rec. 14694-14695 (May 23, 1968).

In the case before this Court, the Government's own witness testified that the interception was committed in furtherance of a criminal act, violation of Tennessee's gambling laws. Compare United States v. Traficant, 558 F.Supp. 996 (N.D. Ohio 1983) (evidence did not establish the defendant's argument that tape recordings were made for the purpose of blackmailing him or for any other illegal purpose.)

The Government did not call Rokitka or Underhill as witnesses or in any way establish a legitimate purpose for the interception. Therefore, Judge McRae properly suppressed the tapes as to Defendant Rayburn.

The ruling in United States v. Jones, 542 F.2d 661 (6th Cir. 1976) is consistent with Judge McRae's ruling. In Jones, the Court of Appeals addressed the question of whether Title III applies

to interspousal wiretaps. The Court held the statute applicable stating:

> Although the primary target of the bill was organized crime, the Senate Report makes it clear that the purpose of the bill was to establish an across-the-board prohibition on all unauthorized electronic surveillance. . .

I. CONCLUSION

The precise question presented in this case has not been decided by the Supreme Court or a Court of Appeals although the provisions of the Act under review hav been considered in other settings.

For this reason, and for the foregoing reasons, Defendant, Tony Rayburn, respectfully requests this Court to grant his petition in this cause for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to hear and decide his case on oral argument and briefs.

Respectfully submitted,

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April, 1987

J. CERTIFICATE OF SERVICE

I, James D. Causey, Attorney for Petitioner, hereby certify that I have this ___ day of April, 1987, pursuant to Rule 28 of the Supreme Court Rules, caused to be served upon The Honorable W. Hickman Ewing, United States Attorney, Federal Building, Memphis, Tennessee 38103, Mr. Frederick H. Godwin, Assistant United States Attorney, Federal Building, Memphis, Tennessee 38103, Solicitor General, Department of Justice, Washington, D. C. 20530, Mr. Albert Boyd, Attorney-At-Law, 424 North McNeil, Memphis, Tennessee 38103, Mr. Robert M. Friedman, Attorney-At-Law, Suite 3010 - 100 North Main Bldg., Memphis, Tennessee 38103, Mr. Tommy Jagendorf, Attorney-At-Law, 5248 Pellum Circle, Memphis, Tennessee 38117, Mr. Steve Butler, Attorney-At-Law, 22 N. Front Street, Suite 1020, Memphis, Tennessee 38103, Mr. John P. Colton, Jr., Attorney-At-Law, 629 Poplar Avenue, Memphis, Tennessee 38105, and

Mr. Frank Holloman, Attorney-At-Law, 240 Poplar Avenue, Memphis, Tennessee 38103, copies of the foregoing Petition for Writ of Certiorari filed by Tony Rayburn, by placing copies of the same in the United States Mail, properly addressed, and with sufficient postage affixed thereto.

James D. Causey

EDITOR'S NOTE:

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Supreme Court, U.S.
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CLERK

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

OCTOBER TERM, 1986

TONY RAYBURN,

PETITIONER

vs.

UNITED STATES OF AMERICA,

RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 86-5409, 86-5412

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

HOWARD "ACE" UNDERHILL, DANIEL ROKITKA, EDDIE OSBORNE, JOE OSBORNE and WALTER PERSON,
Defendants-Appellees. (86-5409)

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

PAT TATA and TONY RAYBURN,
Defendants-Appellees. (86-5412)

ON APPEAL from the United States District Court for the Western District of Tennessee.

Decided and Filed March 6, 1987

Before: LIVELY, Chief Judge; KEITH and MERRITT, Circuit Judges.

LIVELY, Chief Judge. The question for decision is whether the participants in an illegal gambling business, some of

whom caused their telephone conversations to be intercepted and recorded, are entitled to have these recordings suppressed during a prosecution for violation of federal anti-gambling statutes. The answer depends on our construction of various provisions of the Federal Wiretap Act, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510, *et seq.* (1982) (Title III or the Act).

The exclusionary provision of Title III is contained in 18 U.S.C. § 2515:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Section 2515 is not self-executing. The Act provides that any "aggrieved person" may move to suppress the contents of an intercepted communication on the ground, *inter alia*, that "the communication was unlawfuly intercepted. . . ." 18 U.S.C. § 2518(10)(a)(i). An aggrieved person is one "who was a party to any intercepted wire or oral communication or a person against whom the interception was directed." 18 U.S.C. § 2510(11).

The defendants in this criminal prosecution made timely motions to suppress tapes in the possession of the government on the ground that they were recordings of telephone conversations that had been illegally intercepted. Folowing an evidentiary hearing the district court concluded that § 2515 required suppression and granted the motions. The United States has appealed pursuant to 18 U.S.C. § 3731 and we now reverse.

I.

The appellees, along with others not before this court, were indicted by a federal grand jury in the Western District of Tennessee for conspiracy and various substantive offenses related to the ownership and operation of an illegal gambling business. When federal agents searched an apartment leased by the defendant Daniel Rokitka they found a great deal of gambling paraphernalia. They also observed tape recorders attached to the two telephones in the apartment and seized fifteen audio cassette tapes. FBI agent Richard Gray, who listened to the tapes, testified at the suppression hearing that the recorded conversations involved the exchange of gambling information and the placing of bets on sporting events. Agent Gray also stated that the telephones were manned by defendants Rokitka and Underhill, and the recordings contained conversations with defendants Person, Tata, Rayburn and Eddie and Joe Osborne.

Unless there is a specific section of the statute which excepts a particular interception, all willful interceptions of wire and oral communications are prohibited by the Act. 18 U.S.C. § 2511(1)(a). Willful disclosure of the contents of communications by a person who knows or has reason to know that the information was obtained through an unlawful interception is also forbidden. 18 U.S.C. § 2511(1)(c). The exceptions to the general proscription against interceptions are contained in 18 U.S.C. § 2511(2). The defendants contend that the only exception which could render the tapes legal and therefore admissible does not apply because of the purpose for which the recordings were made. They refer to 18 U.S.C. § 2511(2)(d):

> (d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communica-

> tion is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

There was no dispute at the suppression hearing over the purpose of the interceptions. Agent Gray testified that he had interviewed defendant Rokitka in the presence of an attorney, and Rokitka stated that the purpose of the tapes was to record the bets as made, in order to prevent disagreements with bettors over the amount of their wagers. Also, on one of the tapes Underhill told the other party to a telephone conversation that he recorded everything to correct the problem of bettors trying to change the amounts of their bets after losing. One of the statutes under which the defendants were indicted, 18 U.S.C. § 1955, makes it a crime to carry on a gambling business which is a violation of the law of the state in which it is conducted. Tennessee has laws which make gambling illegal, including one against making or possessing gambling records. Tennessee Code Annotated (TCA) § 39-6-602(e) (1982). In granting the defendants' motion to suppress the tapes, the district court, referring to the tape on which Underhill discussed the practice of recording, stated in an unpublished order, "This taped conversation clearly establishes that the interception of telephone conversations wherein bets were made was for the purpose of committing a criminal act under multiple criminal laws of the state of Tennessee pertaining to gambling, gambling records, and transmitting gambling information."

During the evidentiary hearing the district judge noted the anomaly created by the defendants' motions:

> [T]his is the first time I've ever had defendants . . . come in and . . . say . . . I admit I was being unlawful and, therefore, you can't use the evidence. It's a little bit awkward.

Nevertheless, the court found the language of the statute clear and unambiguous and felt compelled to comply with its command.

II.

A.

Repeating the arguments which prevailed in the district court, the defendants contend that the language of the Act is clear in every respect relevant to this appeal and must be applied as written. As they point out, the Act makes all interceptions of oral and wire communications illegal unless specifically excepted. Turning to 18 U.S.C. § 2511(2)(d), they recognize that interceptions by private persons not acting under color of law are permitted if the interceptor is a party to the communication or one of the parties to the communication has consented to the interception. However, this exception to the general prohibition against interceptions is itself subject to an exception. A private interception that otherwise would be lawful is rendered unlawful if the interception is made for the purpose of committing any criminal act. Since the only evidence produced at the suppression hearing demonstrated that Underhill and Rokitka made the interceptions for the purpose of committing criminal acts, the defendants maintain that the clear language of the Act makes the interceptions unlawful.

The defendants then assert that § 2515 unequivocally prohibits the admission into evidence of the contents of the tapes in their trial because the disclosure of the information on the tapes would violate 18 U.S.C. §§ 2511(1)(c) and (d). Finally, the defendants invoke § 2515 as "aggrieved persons" within the definition contained in § 2510(11) who have standing to seek suppression pursuant to § 2518(10)(a)(1). In short the defendants argue that they satisfied every requirement of the Act for suppression of the tapes.

Although they contend that the language of the Act is clear and requires no reliance on extrinsic evidence for its mean-

ing, the defendants also argue that the legislative history of the Act supports their construction. To bolster this argument they quote from S. Rep. No. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Admin. News 2112, 2184-85:

> Section 2515 of the new chapter imposes an evidentiary sanction to compel compliance with the other prohibitions of the chapter. It provides that intercepted wire or oral communications or evidence derived therefrom may not be received in evidence in any proceeding before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision of a State, where the disclosure of that information would be in violation of this chapter.
>
> * * *
>
> The provision thus forms an integral part of the system of limitations designed to protect privacy. Along with the criminal and civil remedies, it should serve to guarantee that the standards of the new chapter will sharply curtail the unlawful interception of wire and oral communications.

In addition, the defendants point to the findings of Congress in connection with the enactment of Title III:

> In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce, it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, to prohibit any unauthorized interception of such communications, and the use of the

> contents thereof in evidence in courts and administrative proceedings.

Pub. L. 90-351, § 801(b), *reprinted in* 1968 U.S. Code Cong. & Admin. News 253. Thus, they emphasize the intent of Congress to protect privacy in oral and wire communications by outlawing all wiretapping and electronic surveillance unless strict procedures are followed.

B.

The government argues that Congress did not intend to permit lawbreakers to immunize themselves from prosecution by their own acts, the criminal purpose of which made the interceptions illegal. The principal purpose of the Omnibus Crime Control Act was to combat organized crime, and Title III provides for the use of authorized interceptions to further this objective. It would be a complete perversion of the Act, the government contends, to permit criminals who have deliberately violated the law against interceptions to benefit from this violation, enabling them to suppress the most persuasive evidence of their wrongdoing. While conceding that one of the purposes of the Act is to protect privacy in communications, the government asserts that congressional concern was for the privacy of parties to a conversation who have not caused the interception or consented to it. The defendants' own proof shows that Underhill and Rokitka actually caused the interceptions and the other defendants took the risk of electronic surveillance by conducting their illegal business with Underhill and Rokitka over the telephone.

The government also argues that the legislative history, and at least one Supreme Court decision, make clear that the perpetrator of an unlawful interception is not to benefit from his illegal act and that only victims of such interceptions have standing to suppress the contents. There is little legislative history with respect to § 2511(2)(d), because it was adopted as an amendment on the floor of the Senate. However, the

government maintains that the statements of its sponsors indicate that their intent was not to benefit persons in the position of the defendants. Finally, the government argues that the purpose of the interception by Underhill and Rokitka was merely to preserve an accurate record of their transactions to prevent later distortion by the other parties to the conversations, and that such a defensive act is not "for the purpose of committing any criminal or tortious act."

III.

It appears that the precise question presented in this case has not been decided by the Supreme Court or a Court of Appeals, although the provisions of the Act now under review have been considered in other settings. We begin our analysis with several observations about which there is no controversy.

A.

As part of the Omnibus Crime Control Act, Title III furthers the primary purpose of that statute to provide more effective means for combatting organized crime in the United States. Thus, Title III provides for the interception of wire or oral communications when sought by the Attorney General or his designee and authorized by a federal judge. 18 U.S.C. § 2516. The Act imposes stringent requirements which must be met in seeking authorizations to carry out interceptions. The Act requires reports on interceptions actually effected and severely limits the use and disclosure of authorized intercepted wire and oral communications. 18 U.S.C. §§ 2516-19. All of these provisions are intended to make electronic surveillance available as a tool of law enforcement within a framework of carefully crafted procedural restraints designed to protect the constitutional rights of the targets of such surveillance. The second purpose of Title III is to prohibit all other interceptions and disclosures of wire and oral communications unless specifically authorized by a provision

of the Act. 25 U.S.C. §§ 2511-15. Both purposes appear in the findings of Congress and in the legislative history.

B.

Since the interceptions we are concerned with were made by private individuals who were not acting under color of law, the exception contained in § 2511(2)(d) is the only one that is arguably applicable. It is settled that the legality of an interception is determined by the purpose for which the interception is made, not by the subject of the communications intercepted. *United States v. Truglio* 731 F.2d 1123, 1131 (4th Cir.), *cert. denied,* 105 S. Ct. 197 (1984). Thus, the fact that the parties to the intercepted conversations discussed illegal gambling does not affect the legality of the interception.

Generally, when the purpose of an interception is to make or preserve an accurate record of a conversation in order to prevent future distortions by a participant, the interception is legal. *By-Prod Corp. v. Armen-Berry Co.,* 668 F.2d 956, 959 (7th Cir. 1982); *United States v. Phillips* 564 F.2d 32, 33 (8th Cir. 1977). This conclusion is supported by the scant legislative history accompanying § 2511(2)(d), which was added to Title III as a floor amendment. The sponsor of the amendment, Senator Hart of Michigan, emphasized the defensive purpose of the amendment, to protect a nonconsenting party to an intercepted conversation from the danger that another party might use the contents for some criminal purpose such as blackmail or some other tortious or injurious purpose. The entire focus of Senator Hart's comments was on protecting an innocent party from injury or embarrassment. This is clear from his objections to § 2511(2)(c) as originally proposed as well as his comments on the substitute provision that he sponsored. See *Meredith v. Gavin,* 446 F.2d 794, 797-98 and n.5 (8th Cir. 1971).

Underhill and Rokitka testified that the purpose of taping the conversations was to make a record that would settle any

future disputes about the terms of the betting transactions. Despite the general nature of the transactions sought to be memorialized by recording, this purpose might be deemed noncriminal, and the interceptions lawful. *Phillips,* 564 F.2d at 33; *United States v. Turk,* 526 F.2d 654, 657 (5th Cir.), *cert. denied,* 429 U.S. 823 (1976). The question is whether the interceptions were made "for the purpose of committing any criminal ... act" under the laws of Tennessee. The recording was not an element of the criminal act of making and accepting bets. These transactions were unlawful in themselves and the recordings added nothing. However, the taping of the conversations did make a "gambling record" as defined in TCA § 39-6-601(7), and TCA § 39-6-602(e) provides that it is a misdemeanor to knowingly make, possess or store a gambling record. Thus, we must conclude that the communications were intercepted for the purpose of committing a criminal act. However, this does not end our inquiry. We must also decide whether the exclusionary rule contained in § 2515 applies under the circumstances of this case.

IV.

It seems clear that neither the general purpose of Title III to protect the privacy of parties who use wire and oral communications nor the particular purpose of § 2511(2)(d) to prevent misuse of the contents of such communications against a party to such communications would be served by suppressing the tapes in this case. In fact, to do so would turn the statute on its head. It is the duty of a court in construing a federal statute to discover and carry out the intent of Congress. When the intent of Congress is expressed in "reasonably plain terms," a court must ordinarily treat that language as conclusive. *Griffin v. Oceanic Contractors, Inc.,* 458 U.S. 564, 570 (1982). Nevertheless, it is the intention of Congress that controls, and a result contrary to the literal meaning of the words is justified when "the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters. ..." *Id.* at 571.

The Supreme Court, speaking through Justice Reed, provided a comprehensive statement in *United States v. American Trucking Associations, Inc.*, 310 U.S. 534, 542-44 (1940):

> In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute, particularly in a law drawn to meet many needs of a major occupation.
>
> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination." The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function. This duty requires one body of public servants, the judges, to construe the meaning of what another body, the legislators, has said. Obviously there is

> danger that the courts' conclusion as to legislative purpose will be unconsciously influenced by the judges' own views or by factors not considered by the enacting body. A lively appreciation of the danger is the best assurance of escape from its threat but hardly justifies an acceptance of a literal interpretation dogma which withholds from the courts available information for reaching a correct conclusion. Emphasis should be laid, too, upon the necessity for appraisal of the purposes as a whole of Congress in analyzing the meaning of clauses or sections of general acts. A few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to a settled policy, "excepting as a different purpose is plainly shown."

(Footnotes omitted).

B.

As the Supreme Court affirmed in *Gelbard v. United States,* 408 U.S. 41, 48 (1972), "although Title III authorizes invasions of individual privacy under certain circumstances, the protection of privacy was an overriding congressional concern." (Footnote omitted). However, Title III provides protection to the victims of unlawful interceptions, not to the perpetrators. Quoting Senate Report No. 1097, the *Gelbard* Court supplied the emphasis in this sentence: "*The perpetrator must be denied the fruits of his unlawful actions in civil and criminal proceedings.*" *Id.* at 50. We think it is clear that Congress did not intend for § 2515 to shield the very people who committed the unlawful interceptions from the consequences of their wrongdoing. Underhill and Rokitka waived their right of privacy in these communications by their deliberate act of causing them to be recorded. If the language of §§ 2511(2)(d) and 2515 were applied literally to Underhill and Rokitka it would produce an absurd result that we are confident Congress did not intend.

The defendant Person argues that he did not consent to the interception of his conversations, and therefore is entitled to suppress the tapes that contain those conversations. If Person were a mere "customer" of the gambling establishment, this argument would be worthy of consideration. However, as a confederate of Underhill and Rokitka in the gambling business, Person waived his right of privacy in the conversations. All of the appellees were charged with conspiracy, and the evidence produced by the defendants at the suppression hearing indicated that all were in fact members of a conspiracy. As a member of the conspiracy Person was bound by the acts of his co-conspirators and may be held to have waived his right of privacy in communications made in furtherance of the purposes of the conspiracy. *Pinkerton v. United States,* 328 U.S. 640, 646-48 (1946); *United States v. Bowers,* 739 F.2d 1050, 1052 (6th Cir.), *cert. denied sub nom. Oakes v. United States,* 469 U.S. 861 (1984).

Each party to a conversation takes the risk that the other party will record and divulge the contents of that conversation. *Smith v. Cincinnati Post & Times Star,* 475 F.2d 740, 741 (6th Cir. 1973); *United States v. Felton,* 753 F.2d 256, 259 (3d Cir. 1985). In enacting § 2511(2)(d), Congress sought to protect parties from this risk by making otherwise legal interceptions unlawful if the purpose of the interception was an act enumerated in the statute. In doing so it did not intend to deprive prosecutors of the most cogent evidence of wrongdoing because the defendants record evidence of their crimes by intercepting communications with their confederates. Such a result would be "plainly at variance with the policy of the legislation as a whole." *American Trucking Associations,* 310 U.S. at 543.

We have considered all of the authorities cited by the defendants including the isolated statement in *United States v. Jones,* 542 F.2d 661, 668 (6th Cir. 1976), "Although the primary target of the bill was organized crime, the Senate Report makes it clear that the purpose of the bill was to estab-

lish an across-the-board prohibition on all unauthorized electronic surveillance. . . ." The issue in *Jones* was whether there was an implied exception for interspousal communications, and this court held there was not such an exception. The court was not considering a case such as the present one where a literal reading of the Act would have provided an unintended benefit to organized crime. (The district court held in this case that gambling enterprises in the Western District of Tennessee constituted organized crime). We conclude that no right of privacy sought to be protected by the enactment of Title III will be violated by the admission of the 15 tape cassettes.

The judgment of the district court is reversed.

18 U.S.C. §2510. Definitions

As used in this chapter -

(1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) "intercept" means the aural acqui-

sition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than -

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar de-

vice being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents", when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means -

(a) a judge of a United States district court or a United States Court of Appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;

(10) "communication common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of title 47 of the United States Code; and

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

18 U.S.C. §2511. Interception and disclosure of wire or oral communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who -

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when -

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or

foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or

imprisoned not more than five years, or both.

(2)(a)(i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: **Provided**, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) Notwithstanding any other law, communication common carriers, their officers, employees, and agents, landlords, custodians, or other persons, are authorized to provide information, facilities, or technical assistance to persons authorized by law to inter-

cept wire or oral communications or to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, if the common carrier, its officers, employees, or agents, landlord, custodian, or other specified person, has been provided with -

(A) a court order directing such assistance signed by the authorizing judge, or

(B) a certification in writing by a person specified in section 2518(7) of this title or the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required,

setting forth the period of time during which the provision of the information, facilities, or technical assistance is authorized and spec-

ifying the information, facilities, or technical assistance required. No communication common carrier, officer, employee, or agent thereof, or landlord, custodian, or other specified person shall disclose the existence of any interception or surveillance or the device used to accomplish the interception or surveillance with respect to which the person has been furnished an order or certification under this subparagraph, except as may otherwise be required by legal process and then only after prior notification to the Attorney General or the principal prosecuting attorney of a State or any political subdivision of a State, as may be appropriate. Any violation of this subparagraph by a communication common carrier or an officer, employee, or agent thereof, shall render the carrier liable for the civil damages provided for in section 2520. No cause of action shall lie in any court against any communication common carrier, its officers, employees, or agents, landlord, custodian, or other specified person for providing informa-

tion, facilities, or assistance in accordance with the terms of an order of certification under this subparagraph.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall be not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communica-

tion or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

(e) Notwithstanding any other provision of this title or section 705 or 706 of the Communications Act of 1934, it shall not be unlawful for an officer, employee, or agent of the United States in the normal course of his official duty to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, as authorized by that Act.

(f) Nothing contained in this chapter, or section 705 of the Communications Act of 1934, shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications by a means other than

electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, and procedure in this chapter and the Foreign Intelligence Surveillance Act of 1978, shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire and oral communications may be conducted.

18 U.S.C. §2515. **Prohibition of use as evidence of intercepted wire or oral communications.**

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. §2518. **Procedure for interception of wire or oral communications.**

(1) Each application for an order authorizing or approving the interception of a wire or oral communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and

location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type

will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modi-

fied, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that -

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in con-

nection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication under this chapter shall specify -

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including

a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication under this chapter shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobstrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authori-

zation, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objec-

tive and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General, the Associate Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that -

(a) an emergency situation exists that involves:

(i) immediate danger of death or serious physical injury to any person,

(ii) conspiratorial activities threatening the national security interest, or

(iii) conspiratorial activities characteristic of organized crime,

that requires a wire or oral communication to be intercepted before an order authorizing such interception can, with due diligence, be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall e treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8)(a) The contents of any wire or oral communication intercepted by any means authorized

by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under thie chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order of extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of-

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any wire or oral communication intercepted pursuant to this chapter or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial,

hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that -

(i) the communication was unlawfully intercepted;

(ii) the order of authorization

or approval under which it was intercepted is insufficient on its face; and

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this sub-

section, or the denial of an application for an order of approval, if the United States Attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

T.C.A. §39-6-601. **Definitions.**

As used in §§39-6-601 - 39-6-608.

(1) "Bi go" shall mean a game of chance in which players place markers on a pattern of numbered squares, according to numbers drawn and announced by a caller.

(2) "Gain" means the direct realization of winnings; "profit" means any other benefit, direct or indirect, including without limitation benefits from proprietorship, management, and unequal advantage in a series of transactions.

(3) "Gambling" means risking any money, credit, deposit, or other thing of value for gain contingent in whole or part upon lot, chance or the operation of a gambling device, but does not include: bona fide contests of skill, speed, strength or endurance in which awards are made only to entrants or the owners of entries; bona fide business transactions which are valid under the law of contracts; and

other acts or transactions expressly authorized by law;

(4) "Gambling device" means any article, device or mechanism by the operation of in any place in which a right to money, credits, deposits or other things of value may be created, in return for a consideration, as the result of the operation of an element of chance; any article, device or mechanism which, when operated for a consideration does not return the same value or thing of value for the same consideration upon each operation thereof; any device, mechanism, furniture, fixture, construction or installation designed primarily for use in connection with professional gambling; and any subassembly or essential part designed or intended for use in connection with any such device, mechanism, furniture, fixture, construction or installation.

This definition shall not include any coin-operated game or device designed and manufactured for bona fide amusement purposes only, which may, by application of skill,

entitle the player to replay the game or device at no additional cost if:

(A) The game or device accumulates and reacts to no more than fifteen (15) free replays;

(B) Discharges accumulated free replays only by reactivating the game or device for one (1) additional play for each accumulated free replay; and

(C) Makes no permanent record, directly or indirectly, of free replays.

(5) "Gambling information" means any wager made in the course of and any information intended to be used for professional gambling. In the application of this definition the following shall be presumed to be intended for use in professional gambling: information as to wagers, betting odds, or changes in betting odds.

(6) "Gambling premise" means any building, room, enclosure, vehicle, vessel or other place used or intended to be used for professional gambling. In the application of

this definition, any place where a gambling device is found shall be presumed to be used for professional gambling.

(7) "Gambling record" means any record, receipt, ticket, certificate, token, slip or notation given, made, used or intended to be used in connection with professional gambling.

(8) "Professional gambling" means accepting or offering to accept, for profit, money, credits, deposits or other things of value risked in gambling, or any claim thereon or interest therein. Without limiting the generality of this definition, the following shall be included: pool selling and book making; maintaining slot machines, roulette wheels, dice tables, or money or merchandise push cards, punch boards, jars or spindles, in any place; and conducting lotteries, or policy or numbers games, or selling chances therein; and the following shall be presumed to be included: conducting any banking or percentage game played with cards, dice or counters, or accepting any fixed share of the stakes

therein.

(9) "Whoever" and "person" shall include natural persons, partnerships and associations of persons, and corporations.

T.C.A. §39-6-602. **Gambling device a common nuisance - Confiscation - Manufacture and sale unlawful.**

(a) All gambling devices are common nuisances and shall be subject to seizure, immediately upon detection, by any peace officer, and to confiscation and destruction by order of a court having jurisdiction, except when in the possession of officers enforcing §§39-6-601 - 39-6-608.

(b) No property right in any gambling device shall exist or be recognized in any person, except the possessory right of officers enforcing §§39-6-601 - 39-6-608.

(c) All fixtures, equipment and stock, including without limitation furnishings and fixtures adaptable to nongambling uses and equipment and stock for printing, recording, computing, transporting, safekeeping or (except as otherwise provided in §39-6-603(3) communication used in connection with professional

gambling or maintaining a gambling premise, and all money or other things of value at stake or displayed in or in connection with professional gambling or any gambling device, shall be subject to seizure, immediately upon detection, by any peace officer, and shall, unless good cause is shown to the contrary by the owner, be forfeited to the state by order of a court having jurisdiction, for disposition by public auction or as otherwise provided by law. Bona fide liens against property so forfeited shall, on good cause shown by the lienor, be transferred from the property to the proceeds of the sale of the property. Forfeit moneys and other proceeds realized from the enforcement of this subsection shall be paid equally into the general funds of the state and the general funds of the political subdivision or other public agency, if any, whose officers made the seizure, except as otherwise provided by law.

Except as to counties having a metropolitan form of government, upon ratification to chapter 181 of the 1975 Public Acts of Tennessee

by the local governing body of a municipality, metropolitan government or county governing body by ordinance, said municipality's or county's portion of funds so received shall be designated by the state of Tennessee and placed in a special account entitled "gambling forfeitures," for use only by the said municipality's or county's local law enforcement officers, and used for undercover work, buying of drugs for undercover work, or for use of any similarly related matter to undercover work. Accounting procedures for the financial administration of said funds shall be in keeping with those prescribed by the comptroller of the treasury.

(d) Whoever knowingly owns, manufactures, possesses, buys, sells, rents, leases, stores, repairs or transports any gambling device, or offers or solicits any interest therein, whether through an agent or employee or otherwise, shall be guilty of a misdemeanor and fined not more than one thousand dollars ($1,000) and in the discretion of the court im-

prisoned in the county jail or workhouse for some period of time less than one (1) year. Subsection (b) of this section shall have no application in the enforcement of this subsection.

(e) Whoever knowingly prints, makes, possesses, stores, or transports any gambling record, or buys, sells, offers or solicits any interest therein, whether through an agent or employee or otherwise shall be guilty of a misdemeanor and shall be fined not more than five hundred dollars ($500) and in the discretion of the court imprisoned in the county jail or workhouse for a period of time not more than six (6) months, and in the enforcement of this subsection direct possession of any gambling record shall be presumed to be knowing possession thereof.

CERTIFICATE OF SERVICE

I, James D. Causey, Attorney for Petioner, hereby certify that I have this ___ day of April, 1987, pursuant to Rule 28 of the Supreme Court Rules, caused to be served upon The Honorable W. Hickman Ewing, United States Attorney, Federal Building, Memphis, Tennessee 38103, Mr. Frederick H. Godwin, Assistant United States Attorney, Federal Building, Memphis, Tennessee 38103, Solicitor General, Department of Justice, Washington, D. C. 20530, Mr. Albert Boyd, Attorney-At-Law, 424 North McNeil, Memphis, Tennessee 38103, Mr. Robert M. Friedman, Attorney-At-Law, Suite 3010 - 100 North Main Bldg., Memphis, Tennessee 38103, Mr. Tommy Jagendorf, Attorney-At-Law, 5248 Pellum Circle, Memphis, Tennessee 38117, Mr. Steve Butler, Attorney-At-Law, 22 N. Front Street, Suite 1020, Memphis, Tennessee 38103, Mr. John P. Colton, Jr., Attorney-At-Law, 629 Poplar Avenue, Memphis, Tennessee 38105, and

Mr. Frank Holloman, Attorney-At-Law, 240 Poplar Avenue, Memphis, Tennessee 38103, copies of the foregoing Appendix to Petition for Writ of Certiorari filed by Tony Rayburn, by placing copies of the same in the United States Mail, properly addressed, and with sufficient postage affixed thereto.

James D. Causey

(3)

No. 86-1691

Supreme Court, U.S.
FILED
MAY 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

TONY RAYBURN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
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Washington, D.C. 20530
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TONY RAYBURN, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in reversing an order suppressing as evidence recorded telephone conversations that were seized during a warrant-authorized search.

Petitioner and four others were charged in an indictment returned in the United States District Court for the Western District of Tennessee. The indictment charged them with conducting an illegal gambling business, in violation of 18 U.S.C. 1955; conspiracy to violate federal gambling laws, in violation of 18 U.S.C. 371; and accepting wagers without paying the federal wagering tax, in violation of 26 U.S.C. 7262. Petitioner moved to suppress tapes of gambling-related conversations that were seized in a warrant-authorized search of a "wire room" that petitioner and his co-defendants had allegedly used for illegal gambling. Petitioner argued that the use of the tapes as evidence was prohibited by the federal wiretap statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. (& Supp. III) 2510 *et seq.* He relied

in particular on 18 U.S.C. 2511(2)(d), which permits surreptitious recording by a party to a conversation, except when the interception is "for the purpose of committing any criminal * * * act in violation of the * * * laws of the United States or of any State." He also relied on 18 U.S.C. 2515, which prohibits the receipt of illegally intercepted conversations in evidence "in any trial."

On March 6, 1986, the district court granted the motion. It rejected the argument that suppression was contrary to the purposes of the wiretap statute. On the government's appeal, the court of appeals reversed. It found that neither the general purpose of Title III to protect the privacy of parties nor the particular purpose of Section 2511(2)(d) to prevent the misuse of the contents of intercepted communications would be served by suppression in the context of this case. The court of appeals concluded that the parties to the conversations waived their right of privacy by the deliberate act of recording them. In addition, the court concluded that Congress did not intend for Section 2515 to shield the very persons who conducted the interceptions from the consequences of their own acts (Pet. App. 1-14).

Petitioner contends (Pet. 18-47) that a proper construction of the federal wiretap statute bars the use of the fruits of interceptions made for the purpose of committing a criminal act such as illegal gambling. Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to suppress. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his contentions to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final

judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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* Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.

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